

In: KSC-BC-2020-06

Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Counsel for Rexhep Selimi

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Selimi Defence Response to Confidential Redacted Version of ‘Prosecution Rule 107(2) request’, KSC-BC-2020- 06/F00875

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I. INTRODUCTION

1. The Defence for Mr. Selimi hereby responds to the Confidential Redacted Version of 'Prosecution Rule 107(2) request', KSC-BC-2020- 06/F00875 which was notified to the Defence on 18 July 2022 ("Request").
2. The heavily redacted nature of the Request renders meaningful Defence submissions on this issue almost impossible. A re-filed, or re-organised version of the Request should therefore be submitted by the SPO to allow for substantive Defence submissions without compromising the relief sought by the SPO.
3. Further, based on the limited information available, the SPO's interpretation of its disclosure obligations and its obligations in relation to the relevant counterbalancing measures under the Law¹ and Rules², appears to be distinctly lacking. Based on the information made available to the Defence in the present filing, these measures are deficient, and on this basis, the Request should also be rejected.

II. SUBMISSIONS

A. Nature of the Request

4. The Request appears to relate to three groups of documents provided by three different information providers, covering (1) Annexes 1-10 and 23 (2) Annexes 11-20; and (3) Annexes 21-22. However, the Request in its redacted form, doesn't separate the documents out in a comprehensible manner. Instead, the Request redacts the title of each information provider in paragraphs 3-5 of the Request, thus making it unclear in the following paragraphs, addressing each individual

¹ Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

² Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

document, which of these information providers are matched to each document discussed.

5. Given the obligation of the SPO to apply its redactions in a meaningful manner, re-submission of the Request with coherent redactions should be required. Nothing would have prevented the SPO from referring to each of the three information providers in the Request by pseudonym, such as “Information Provider No. 1”, which would then have allowed for comprehensibility and consistency when addressing the SPO submissions regarding the documents and information providers in question.
6. Moreover, the extensive redactions to the body of the Request, render comprehension of the nature of the document requested, as well the nature of the parts of that document for which the SPO seeks redactions, almost impossible. While the Defence fully understands the confidential and *ex parte* nature of Rule 107(2) requests, it is noted that previous Rule 107 requests by the SPO have provided significantly greater information to the Defence than in the instant request.
7. For example, when seeking Rule 107(2) restrictions on disclosure in November 2021, the SPO provided the full title and ERN of each of the documents concerned³ facilitating meaningful submissions.⁴ They were able to do so without undermining the very restrictions they sought under Rule 107(2). There is no reason given as to why a similar approach could not have been followed here.
8. This is especially the case in relation to the current Request, as part of the titles of the documents might be covered by the Request provided to the Defence by their

³ KSC-BC-2020-06/F00555, Confidential Redacted Version of ‘Prosecution Rule 107(2) request’, KSC-BC-2020-06/F00555, dated 1 November 2021, 2 November 2021.

⁴ KSC-BC-2020-06/F00565, Selimi Defence Response to Confidential Redacted Version of ‘Prosecution Rule 107(2) request’, KSC-BC-2020-06-F00555, dated 1 November 2021, 12 November 2021.

inclusion in the SPO's Rule 102(3) list provided in July 2021.⁵ In these circumstances, when the SPO has already provided the titles of the documents to the Defence, including the titles, ERNs or the Rule 102(3) list reference to these documents in the Request would have allowed the Defence to understand and make submissions on the actual documents concerned.

9. Therefore, to allow the Defence to properly comprehend, and make effective submissions on the documents covered by the Request, it should be refiled to include the following information:

- (i) Replacement of the name of the information provider with a suitable pseudonym; and,
- (ii) Detailed further information on the nature of the documents affected by the Request and the nature of the redactions sought to them.

B. Scope of Counterbalancing measures

10. While the Defence is unable to make meaningful submissions on each document or class of documents covered by the Request for the reasons set out above, it is already apparent that based on the SPO's own limited explanation of the nature of the documents covered:

- (i) The SPO's assertions regarding the incriminatory, exculpatory or irrelevant nature of the documents must be independently verified by the Pre-Trial Judge and should not be determinative;
- (ii) Allegedly generic or self-serving documents are still subject to disclosure;

⁵ KSC-BC-2020-06/F00421/A01, Annex 1 to Prosecution Rule 102(3) notice with confidential Annex 1 and confidential *ex parte* Annex 2, 30 July 2021. In addition, on 17 December 2021 the SPO notified the Selimi Defence that "less than 100 items on the Rule 102(3) Notice have been identified which cannot be disclosed because of Rule 107 restrictions."

(iii) The relevance of documents requested pursuant to Rule 102(3) should be interpreted widely; and,

(iv) Counterbalancing measures proposed by the SPO are insufficient.

11. First, the SPO repeatedly refers to documents being predominantly or purely incriminatory⁶ as being relevant for the Request. However, the mere fact that the SPO considers such documents incriminating and yet does not rely on them in support of its case, casts some doubt on their classification and necessitates further assessment by the Pre-Trial Judge.

12. Further, simply because they are assessed by the SPO to be superficially incriminating, this does not automatically make them consistent with, or supportive of, other purportedly incriminating evidence. Any inconsistencies in these documents, which may therefore call into question the credibility of individuals upon whom this information is based, is therefore relevant to Defence preparation and thus should be disclosed with the necessary redactions to protect the source of the information.

13. Second, the same principle of allowing the disclosure of information is true for documents that are purportedly “generic and self-serving”.⁷ This interpretation by the SPO is inherently subjective, but is also a matter ultimately of reliability and therefore weight of the evidence. These too should be disclosed with the necessary redactions to protect the source of the information.

14. Third, the SPO repeatedly seeks to minimise the relevance of the documents for which it seeks Rule 107(2) protection from disclosure. In this regard, the SPO asserts that the relevant documents contain “brief initial screening contacts, [...] or events that occurred after the indictment period”⁸, concerns “contact details of

⁶ Request, paras 7, 8, 9, 12, 24 & 32.

⁷ Request, paras 8, 10.

⁸ Request, para. 12.

individuals unrelated to the case”⁹, is “is irrelevant to the indictment”¹⁰, “records irrelevant information,”¹¹ “post-dates the indictment period, is at most of tangential relevance”¹² or “do not fall within the scope of the charged crimes.”¹³

15. In this regard, the Defence notes the Pre-Trial Judge’s finding in relation to disclosure under Rule 102(3) that:

“What is relevant in this context should not necessarily be limited by the temporal scope of the Confirmed Indictment nor should it be confined to material relevant to countering the SPO’s case. The Defence preparation is also a broad concept and need not be limited to what is directly linked to exonerating or incriminating evidence, or related to the SPO’s case.”¹⁴

16. Given that the documents concerned were considered by the SPO to be sufficiently relevant to the degree that they appear on the Rule 102(3) list; in accordance with the above finding of the Pre-Trial Judge, it must be presumed that they are therefore relevant to the Defence’s preparation. The bland and sweeping assertions to the contrary in the Request do nothing to counter this presumption.

17. Fourth, the SPO seeks to avoid or minimise the counterbalancing measures that should be ordered by the Pre-Trial Judge. Counterbalancing measures only take effect when the SPO has been authorised not to disclose information that otherwise would be subject to disclosure. While this obligation is evidently important in relation to material covered by Rule 102(3), when such material is of a potentially exculpatory nature under Rule 103, even when not originally designated in this manner, it takes on an even greater importance. The Pre-Trial

⁹ Request, para. 15.

¹⁰ Request, paras 16, 29.

¹¹ Request, para. 18.

¹² Request, para. 19.

¹³ Request, para. 24.

¹⁴ KSC-BC-2020-06/F00099, Framework Decision on Disclosure of Evidence and Related Matters, 23 November 2020, para. 62 (“Framework Decision”).

Judge must therefore scrupulously and independently assess the exculpatory nature of the material, even when the SPO asserts that it is not, in fact, exculpatory.¹⁵

18. In addition to the four points outlined above, none of the counterbalancing measures specifically set out in the Request appear to be sufficient to compensate for the refusal to disclose the unredacted information.

19. For certain documents¹⁶ the SPO considers that no counterbalancing measures are necessary, in part, because they could be obtained from open sources. The Defence notes that where the SPO had previously sought to evade its Rule 102(1)(b) disclosure obligations, the Pre-Trial Judge held that the “the regime proposed by the SPO leaves an excessive latitude to the SPO to decide what material falls under the exception to disclosure”¹⁷ and required instead that the SPO notify the Defence and Pre-Trial Judge of any such material in relation to which it wished to be exempted from disclosure”¹⁸ including the “exact source for example the URL, under which the material can be found.”¹⁹ This information should always be provided to the Defence whenever the SPO seeks to rely on the open source nature of material as a counterbalancing measure.

20. One proposed counterbalancing measure is entirely redacted, which renders meaningful Defence submissions on the matter impossible.²⁰

21. Finally, for one document, which the SPO admits is exculpatory, the most that the SPO considers would constitute a counterbalancing measure is the provision of

¹⁵ KSC-BC-2020-06/F00634, Confidential Redacted Version of Decision on Specialist Prosecutor’s Rule 107(2) Request and Material Deferred in the Twelfth Decision on Specialist Prosecutor’s Request for Protective Measures, 22 December 2021, para. 21.

¹⁶ Request, para. 18 referring to Annex 7; paras 29-30; paras 33-34 referring to Annexes 21-22.

¹⁷ Framework Decision, para. 67.

¹⁸ Ibid.

¹⁹ Id.

²⁰ Request, para. 13.

an anonymised summary.²¹ While the lack of any information on the nature of the document and content of its exculpatory information limits submissions in this regard, providing an anonymised summary is generally little if any assistance both in terms of Defence investigations or as Defence evidence.

III. CONCLUSION AND RELIEF REQUESTED

22. For the reasons set out herein, the Defence requests the Pre-Trial Judge to:

- (i) Order the SPO to refile the Request with the additional information provided as sought in paragraph 9; or, otherwise
- (ii) Deny the request in its entirety.

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Respectfully submitted on 28 July 2022,



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²¹ Request, para. 10.



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